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MAY 16 1997

Federal Communications Commission
Office of Secretary

May 16, 1997

By Hand

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Re: Notice of Proposed Rulemaking
CS Docket No. 97-80

Dear Mr. Caton:

On behalf of CellularVision USA, Inc., enclosed please find an original and four (4) copies of its Comments filed in the above-referenced rulemaking proceeding.

Please direct any questions regarding this matter to the undersigned.

Sincerely,



Michael R. Gardner
Counsel for CellularVision USA, Inc.

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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MAY 16 1997

Federal Communications Commission
Office of Secretary

In the Matter of)

Implementation of Section 304 of the)
Telecommunications Act of 1996)

Commercial Availability of)
Navigation Devices)

CS Docket No. 97-80

COMMENTS OF CELLULARVISION USA, INC.

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Summary

As the pioneer of the LMDS technology and the only commercial LMDS licensee in the United States, CellularVision has been working closely with various equipment manufacturers whose products will be key to the prompt deployment of LMDS — a wireless technology that can simultaneously offer consumers voice, data and video services. Because of the inherent flexibility of LMDS technology, CellularVision believes that LMDS is a multi-faceted service that extends far beyond Congress' narrow classification of a "video programming distribution systems," and thus should be exempt from the Commission's implementation of Section 629. Moreover, unlike traditional MVPDs such as cable, DBS, SMATV or wireless cable, it is virtually impossible to subject LMDS to a common set of rules under a uniform definition of "MVPD" since LMDS is capable of such diverse, simultaneous applications.

If the Commission determines that *LMDS video programming providers* should be subject to Section 629, this rulemaking should be bifurcated to enable the Commission to first focus on the mature cable and DBS industries — industries that have attained significant market share with the well-developed CPE markets that Congress primarily sought to address in enacting Section 629. Meanwhile, the Commission should forbear from regulating LMDS video programming providers until the service is licensed nationwide and the attendant equipment market fully develops.

Finally, with regard to emerging wireless MVPDs generally, the Commission should not prohibit exclusive equipment manufacturing and retailing agreements as these non-affiliated relationships are necessary to adequately promote new service offerings, particularly in the initial stages of development.

Before the
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Washington, DC 20554

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Navigation Devices)	
)	

COMMENTS OF CELLULARVISION USA, INC.

CellularVision USA, Inc.¹ ("CellularVision") by its attorneys, hereby files Comments in response to the *Notice of Proposed Rulemaking ("NPRM")* (FCC 97-53) adopted February 11, 1997 in the above-referenced proceeding.

I. Introduction

During the past eleven years, the principals of CellularVision² have pioneered the development of LMDS, an exciting new wireless service that will afford consumers a

¹ CellularVision USA, Inc. is publicly traded on the NASDAQ National Market under the symbol "CVUS."

² For purposes of this document, references to "CellularVision" include the following related companies which are majority owned and controlled by common principals: Suite 12 Group, which commenced the development of LMDS in the 28 GHz band; and CellularVision of New York, L.P., which operates a commercial LMDS service in the New York Primary Metropolitan Statistical Area in the 28 GHz band pursuant to a commercial license granted by the Commission in 1991. *See Hye Crest Management, Inc.*, 6 FCC Rcd 332 (1991) ("*Hye Crest Order*").

panoply of competitive service offerings, including interactive video, telephony and high-speed data access. Today, CellularVision is the only commercially licensed LMDS provider in the United States, having been awarded a license in 1991 by the Commission to serve the 8.3 million consumers in the vast New York PMSA.³ As a result of the tenacious commitment of CellularVision's founders, culminating in the recently-released *LMDS Second Report and Order*, LMDS is about to become a reality through nationwide spectrum auctions.⁴

Directly related to these initiatives, CellularVision has been working for the past several years with various equipment manufacturers whose products will be key to the prompt deployment of LMDS throughout the United States. Accordingly, based on CellularVision's unique status as the only commercially licensed LMDS provider in the United States, as well as its catalytic efforts to accelerate the development of a major LMDS equipment supply marketplace, CellularVision's comments represent an informed perspective on why the multi-faceted LMDS technology should not be subject to rules that could inhibit the fullest and promptest development of this embryonic industry.

³ See generally, *Hye Crest Order*.

⁴ See *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, CC Docket No. 92-297, released March 13, 1997 ("*LMDS Second Report & Order*").

II. LMDS, as a Generic Service, Should Be Exempt from the Commission's Implementation of Section 629

Section 629 of the Telecommunications Act of 1996 ("1996 Telecom Act")⁵ seeks to ensure the availability of navigation devices "to consumers of multichannel video programming and other services offered over *multichannel video programming systems*."⁶ While the term "multichannel video programming distribution system" is not defined, it is clear that this term signifies a video programming distribution system operated by a multichannel video programming distributor ("MVPD"). Both the title to Section 629 — "Commercial Consumer Availability of Equipment used to Access Services Provided by *Multichannel Video Programming Distributors*" — and the legislative history indicate that Congress intended to capture MVPD systems as commonly defined by Section 602(13).⁷ In turn, as the Commission notes, a multichannel video programming distributor includes:

"a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service or a television receive only satellite program distributor who makes available for purchase, by subscribers or customers, *multiple channels of video programming*."⁸

As a result, the Commission need not look beyond Congress' definition of an MVPD

⁵ Pub. L. 104-104, 110 Stat. 56 (1996).

⁶ 47 U.S.C. §549(a).

⁷ See H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 181 (1996) ("Conference Report") (clarifying that Section 629 includes "only equipment used to access services provided by *multichannel video programming distributors*.") (*emphasis added*).

⁸ *NPRM*, ¶14; 47 U.S.C. §522(13) (*emphasis added*).

when determining the scope of those "multichannel video programming systems" subject to Section 629.

Equally important, and even more fundamental, it is clear that Congress intended Section 629 to only apply to those systems providing video programming. Importantly, a review of the House Report indicates that this section was far more expansive than finally adopted by Congress. In fact, the original term utilized in this section was "telecommunications subscription service," which was defined as the "provision directly to subscribers of *video, voice or data services* for which a subscriber charge is made."⁹ However, as the Conference Report indicates, the breadth of this provision was dramatically reduced prior to enactment, "[t]he scope of the regulations are narrowed to include only equipment used to access services provided by multichannel video programming distributors."¹⁰ Thus, by dropping the broad category of "telecommunications subscription services," it is also clear that Congress limited the applicability of Section 629 strictly to equipment used to access video programming, and related ancillary services, offered by MVPDs.

LMDS, however, is a uniquely flexible service that is capable of a wide array of telecommunications services including wireless local telephone, high speed two-way data transmissions, telemedicine and video conferencing. Recognizing the inherent versatility of LMDS technology, the Commission in the *LMDS Second Report and Order*

⁹ H.R. Conf. Rep. No. 104-204, 104th Cong., 1st Sess. 200 (1995) (*emphasis added*).

¹⁰ Conference Report, p. 181.

refrained from attaching a restrictive classification to the new service and instead designed a regulatory scheme to "give applicants and licensees the flexibility to design their service offerings in response to market demand."¹¹ Moreover, the Commission stated:

To ensure the flexibility in LMDS service offerings . . . we will permit *any fixed terrestrial uses* that can be provided within the technical parameters of LMDS. We concluded that, for now, our significant allocation of spectrum under such a *broad and flexible service definition* should permit licensees to satisfy a broad array of their customers' communications needs, *whether through one or multiple service offerings*. Although LMDS is allocated as a fixed service, we know of no reason why we would not allow *mobile operations* if they are proposed and we obtain a record in support of such an allocation. We believe this would be consistent with our goal of providing LMDS licensees with maximum flexibility in designing their systems."¹²

Thus, currently, it is impossible to define LMDS as an MVPD. Ironically, based on the present projections for LMDS service offerings, it is more realistic to categorize LMDS as a now-exempt "telecommunications subscription service." Unlike traditional MVPDs such as cable, DBS, SMATV or wireless cable, the potential variety of technical designs and various applications for LMDS technology make it virtually impossible to subject LMDS to a common set of rules under a uniform definition of "MVPD." Moreover, due to flexible LMDS partitioning and disaggregation rules presently being finalized,¹³ the Commission is expected to provide further opportunity

¹¹ *LMDS Second Report & Order*, ¶208.

¹² *LMDS Second Report and Order*, ¶207 (*emphasis added*).

¹³ See generally, note 4.

for LMDS “niche” providers to meet specific commercial and residential needs through evolving LMDS technological applications. Thus, LMDS operators that choose *not* to offer video programming services, or offer video programming as an ancillary service to some other telecommunications service, cannot be subject to Section 629. As a result, CellularVision submits that, at best, the only type of LMDS provider that arguably could be subject to Section 629 would be those entities providing video programming, either alone, or as its primary service offering. Moreover, in view of the fact that the Commission has not conducted LMDS spectrum auctions in the 492 BTAs across the country, it will be years before the Commission could preliminarily determine which LMDS licensee will be video providers.

III. If the Commission Determines that LMDS Video Programming Providers Should Be Subject to Section 629, It Should Defer Further Consideration of Prospective Rules Until the Service Matures

In establishing rules under Section 629, the Commission should first address the DBS and cable industries — as these industries have attained a realistic consumer equipment market status that Congress sought to address in enacting Section 629. At the same time, the Commission should defer consideration of the LMDS video programming issue until the service is entirely licensed and operational nationwide and the attendant equipment market fully develops.

Notwithstanding Section 629(a), the Commission has the authority to forbear from imposing regulations on a particular technology or service and, therefore, may bifurcate this rulemaking by promulgating initial rules for only certain services. In

enacting Section 629, Congress specifically cautioned the Commission to be circumspect in promulgating rules so as not to hinder the development of new technologies:

"The conferees intend that the Commission avoid actions which could have the effect of freezing or chilling the development of new technologies and services. . . . Thus, in implementing this section, the Commission should take cognizance of the current state of the marketplace and consider the results of private standards setting activities."¹⁴

The underlying purpose of Section 629 is to protect consumers by ensuring that they are not forced to purchase or lease specific proprietary navigation equipment from a cable system or network operator.¹⁵ Similarly, the Commission's landmark *Carterphone* decision paved the way for FCC regulations that granted consumers the right to purchase and connect CPE so long as it caused no harm to the network.¹⁶ Past Commission action in this arena established sensible precedent based on proven market demand and characteristics that existed prior to the adoption of regulations intended to eliminate monopolistic, consumer-harmful market barriers. Unlike the promising yet embryonic LMDS video programming service marketplace, the cable and DBS markets have enormous and mature video market share, and presumably, sufficient consumer demand for a separate CPE market to survive. Thus, as Congress

¹⁴ Conference Report, p.181.

¹⁵ *Id.*

¹⁶ See *Carterphone*, 13 FCC 2d 420 (1968), *recon. denied*, 14 FCC 2d 571 (1968).

anticipated in 1996, there may be a need for regulations to ensure commercial availability of these industries' navigation devices at this time.

On the other hand, enacting regulations at this time on the yet to be established LMDS video programming marketplace, where no discernible CPE market or consumer demand exists, could have the untoward effect of preventing, or slowing, the introduction of LMDS video programming products and services to consumers. In sum, to regulate an embryonic technology like LMDS would be tantamount to creating a regulatory solution in search of a non-existent problem. Obviously, the result could be stifling to this exciting new voice, data and video alternative for consumers who are weary of the cost of entrenched telco, cable and DBS service providers.

Because of the undefined nature of the future LMDS marketplace in the United States, it would be impossible at this point in time for the Commission to adopt any cohesive LMDS video programming equipment "standard" to ensure the availability of these navigation devices before the service is licensed nationwide and the attendant equipment market is allowed to mature. Accordingly, the Commission should bifurcate this rulemaking, concentrate on cable and DBS, and consider LMDS video programming providers, if at all, at a latter date after nationwide LMDS auctions are completed and LMDS' multiple services are available to consumers across the country.

IV. If and When the Commission Determines That Emerging Wireless Video Providers Should Be Subject to Section 629, the Commission's Regulations Must Not Stunt the Growth of the Applicable Equipment Market

(A) Exclusive Equipment Manufacturing and Retailing Agreements Promote New Service Offerings in the Initial Stages of Development And Do Not Create "Affiliations"

Operators of emerging MVPD services often must provide the necessary financial inducement so that equipment companies will be willing to manufacture navigation equipment before the new service proves itself in the market. To this end, exclusive arrangements between new MVPD service providers and manufacturers are often necessary to ensure the availability and proper distribution of navigation equipment into the marketplace.¹⁷ Moreover, as the Commission recognizes, until a service matures, "[i]t may be difficult to find retail vendors to sell equipment needed to receive or to navigate through a new service before the service proves itself in the market."¹⁸ Thus, the rules ultimately adopted in this proceeding by the Commission should allow emerging MVPDs to enter into exclusive manufacturing and vendor agreements.¹⁹ To prematurely enact rules that would prevent such exclusive

¹⁷ For example, DBS provider DIRECTV entered into an exclusive initial manufacturing agreement with RCA/Thomson Consumer Electronics in order to ensure a firm commitment to have its product manufactured.

¹⁸ *NPRM*, ¶47.

¹⁹ CellularVision contends that Section 629 is satisfied when navigation devices are commercially available from *one* unaffiliated manufacturer or vendor. Nowhere in the statute or legislative history did Congress expressly state that multiple, non-affiliated outlets are a requirement. Importantly, the Conference agreement indicates that "one purpose of this section is to help ensure that consumers are not forced to purchase or lease a specific, proprietary converter box, interactive device or other

arrangements is overly regulatory and could effectively delay the successful introduction of competitive new video services into the marketplace.

Moreover, under an exclusive manufacturing or retail arrangement, the manufacturer retailer should not be considered an "affiliate" of the MVPD operator where the MVPD operator is also the holder of a patented technology or has other proprietary rights in a particular navigation device. As the Commission points out, Section 602 of the Communications Act defines "affiliate" as "another person who owns or controls, is owned or controlled by, or is under common ownership or control with such person."²⁰ CellularVision does not dispute the Commission's tentative decision to adopt, at its discretion, the ten percent ownership threshold as articulated in Section 3 of the 1996 Telecom Act.²¹ However, given these two consistent statutory definitions of "affiliate" and Congress' explicit use of the word "affiliate" in Section 629, the Commission should go no further in extending its rules to include "product distribution relationships." Obviously, if Congress desired to prohibit exclusive arrangements, it would have simply crafted such language. However, the plain meaning of the term affiliation is clearly defined by Congress to encompass only ownership and/or control. Thus, any exclusive arrangement independent of ownership

equipment from the cable system or network operator." Conference Report, p.181. This objective is satisfied with one unaffiliated vendor or manufacturer. Moreover, it would appear that for no other reason than grammatical style is the statute written in the plural tense.

²⁰ 47 U.S.C. §522(2).

²¹ 47 U.S.C. §153(1).

or control is not inconsistent with Section 629 and does not cause the respective parties to be "affiliates."

(B) The Cross Subsidization Provisions in Section 629(a) Should Not Apply to Unregulated MVPDs Without Market Power

In introducing a new video service into the marketplace, an MVPD operator often may find it necessary to provide set-top boxes or other navigation devices to its subscribers as part of a package for a single monthly charge. Prohibiting an MVPD operator from bundling its navigation devices in such a fashion due to cross-subsidization concerns would, therefore, have the effect of impeding competition in the video services marketplace.

CellularVision agrees with the Commission's tentative conclusion that the cross subsidization provision in Section 629(a) should apply only to cost-of-service regulated MVPDs such as major MSOs not subject to effective competition.²² Specifically, under Section 629, a multichannel video programming distributor would be permitted to offer navigation devices to its customers if the "system operator's charges to consumers for such devices and equipment are separately stated and not subsidized by charges for any such service."²³ As the Commission stated:

"[In enacting this provision] Congress was concerned that regulated MVPDs with market power could use that power, through equipment

²² *NPRM*, ¶45.

²³ 47 U.S.C. §549(a).

cost subsidization, to frustrate competition in the equipment market.”²⁴

Obviously, an emerging MVPD provider who lacks market power as it competes with an entrenched MSO in the video distribution market, cannot engage in anti-competitive behavior in the CPE market by means of cross-subsidization. As the Commission correctly points out, because the rates of rate-regulated firms are dependant on accounting costs, raising the price of the underlying service in order to undercut the CPE market is the type of conduct only a cost-of-service regulated monopolist would seek to engage in. An unregulated, non-monopolist MVPD provider has nothing to gain by such cost shifting measures. Thus, there is no need for the anti-subsidy rules contemplated under Section 629(a) to be imposed on emerging MVPDs.

(C) Developmental Waivers

If the Commission determines that emerging wireless MVPDs, like LMDS video program providers, are subject to its rules under Section 629, it will be critical that the Commission provide the flexibility of the developmental waiver provision of Section 629(c) to innovative technologies like LMDS. In this regard, CellularVision suggests that the Commission adopt a *flexible, case-by-case review* that would facilitate the statutorily-mandate expedited review process. This is necessary since no formal

²⁴ NPRM, ¶38.

review standards could be easily established in regard to a new service until the Commission has gained experience in administering waiver applications under the provision.

CellularVision agrees that waivers should be looked on "sympathetically and expansively to avoid necessary procedural obstacles to innovation."²⁵ In order to keep pace with the rapidly changing equipment marketplace, the Commission should retain the flexibility to grant developmental waivers for varying lengths of time, while providing the applicant with an opportunity to demonstrate the need for an extension, if necessary, at the conclusion of the initial waiver period.

V. Conclusion

The Commission must make certain that the rules it ultimately adopts under Section 629, do not have the untoward effect of stifling the emergence of new technologies like LMDS into the U.S. communications marketplace. Therefore, the Commission should not apply these rules to LMDS, as this inherently versatile technology that is simultaneously capable of providing voice, data and video services defies a narrow categorization as an MVPD. Moreover, as an initial matter, the Commission should now promulgate rules that address Congress' true concern, i.e.,

²⁵ *Id.*, ¶ 48.

ensuring the commercial availability of navigation devices for consumers of cable and DBS — two video services with enormous and mature CPE markets. Prematurely regulating an emerging technology such as LMDS could inhibit the fullest and promptest development of this exciting embryonic industry.

Respectfully submitted,

CellularVision USA, Inc.

By:



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May 16, 1997

Certificate of Service

I, Esther R. Gabriel, hereby certify that copies of the foregoing "Comments of CellularVision USA, Inc." were delivered by hand, on May 16, 1997, to the following:

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